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No. 86-352

In the Supreme Court of the United States

OCTOBER TERM, 1986

KEVIN ELWOOD KRZYSKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court could require petitioner, who was convicted of federal tax evasion and failure to file federal tax returns, to file proper income tax returns and to pay back taxes as conditions of release pending appeal.

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OPINIONS BELOW

The order of the court of appeals partially denying petitioner's motion to eliminate certain conditions of release (Pet. App. A3-A5) is unreported. The order of the court of appeals clarifying its original order and denying petitioner's motion to stay or reverse the district court's order to comply with the release conditions (Pet. App. A8-A9) is also unreported.

JURISDICTION

The original order of the court of appeals was entered on May 1, 1986. The subsequent order of the court of appeals was entered on June 13, 1986. The petition for a writ of certiorari was filed on August 13, 1986, and is therefore out of time under Rule 20.1 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of willfully attempting to evade in-

come taxes for the year 1978, in violation of 26 U.S.C. 7201, and four counts of willfully failing to file income tax returns for the years 1979 through 1982, in violation of 26 U.S.C. 7203 (Pet. App. A3). Petitioner was sentenced to five years' imprisonment and a $10,000 fine on the tax evasion count; on each of the counts charging him with failing to file tax returns, petitioner was sentenced to one year's imprisonment and fined $10,000 (*ibid.*).[1] Petitioner challenges his detention pending appeal.

1. After his conviction, petitioner moved for bail pending appeal pursuant to Section 3143(b) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3143(b).[2] The district court found "nothing meritorious in [petitioner's] appeal" (Pet. App. A1), but nevertheless assumed in its findings, "based on [petitioner's counsel's] assertion alone" (*ibid.*), that petitioner's appeal presented substantial questions of law. The court found, however, that the safety of the community "could be affected" if petitioner continued to violate the tax laws and to espouse his views of the income tax system, possibly causing other individuals to face prosecution for similar tax offenses (*id.* at A1-A2). The court therefore granted petitioner's motion, subject to three conditions. Petitioner was to (1) communicate only with his counsel regarding his tax beliefs during the pendency of his appeal; (2) file proper tax returns within ten days of the district court's order for the period 1978 through 1984; and (3) pay past due taxes when he filed the tax returns (*id.* at A2).

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[1] The sentences for failing to file income tax returns are to run consecutively to each other and concurrently with the term imposed for the tax evasion conviction (*ibid.*).

[2] That Section authorizes bail pending appeal if the district court finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released" and that "the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial" (18 U.S.C. (Supp. II) 3143(b)(1) and (2)).

Both petitioner and the government appealed from the district court's ruling. Petitioner contended that the conditions were improper. The government argued that the district court erred in releasing petitioner because, among other reasons, petitioner's appeal on the merits did not raise a substantial question. See 18 U.S.C. (Supp. II) 3143(b)(2). The court of appeals, addressing only the conditions of release, affirmed in part and reversed in part (Pet. App. A3-A5). The court eliminated the first release condition as a prior restraint on speech under *Near* v. *Minnesota,* 283 U.S. 697 (1931), but it denied petitioner's motion to eliminate the conditions requiring petitioner to file proper returns and to pay back taxes (Pet. App. A4-A5). The court of appeals also granted petitioner's motion to continue bond (*ibid.*). Finally, the court referred the government's motion to revoke bond to the panel that would hear petitioner's appeal on the merits (*ibid.*).[3]

2. Following the court of appeals' decision, the district court instructed petitioner that his opportunity to comply with the release conditions would expire on June 15, 1986 (Pet. App. A6-A7). Petitioner appealed once again, and the court of appeals denied his motion to stay or reverse the district court's order (*id.* at A9). In addition, the court of appeals clarified its earlier ruling by adding the following language: "It is ordered that defendant's motion for continuation of bond pending appeal is granted provided that he files tax returns for 1978-84 within the time required by the district court and provided that all past due taxes are paid by the defendant at the time the returns are filed" (*ibid.*).

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[3] The court of appeals panel did not rule on the government's motion during the period that the district court's conditional release order remained in force. As we explain, page 4, *infra,* the district court entered a subsequent order requiring petitioner's unconditional detention. Petitioner's appeal on the merits remains pending.

On June 25, 1986, petitioner applied to this Court for an emergency stay of the court of appeals' decision pending the filing of a petition for a writ of certiorari. Justice O'Connor denied that request, (No. A-1005 (June 27, 1986)). Petitioner then requested, once again, that the district court modify its conditional release order. The government objected, noting that the time for compliance with the release conditions had lapsed and that the court was free to issue a new order denying petitioner bail pending appeal (July 10, 1986 Tr. 12-13). The court agreed with the government's assessment (*id.* at 18) and entered an order finding that petitioner "does not raise any meritorious issues on appeal," that he "pose[s] a danger to the community if he is released," and that he had failed to comply with the court's previous conditions for bail pending appeal (Pet. App. A10). The court accordingly denied petitioner bail pending appeal (*id.* at A11).

ARGUMENT

The Bail Reform Act of 1984 imposes strict limitations on the release of convicted defendants pending appeal. In order to qualify for bail pending appeal, a defendant must demonstrate by clear and convincing evidence that he is not likely to flee and that he does not pose a danger to the community. See 18 U.S.C. (Supp. II) 3143(b)(1). In addition, the defendant must establish that his appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial" (18 U.S.C. (Supp. II) 3143(b)(2)). Petitioner challenges the application of those provisions in this case.

1. Petitioner specifically challenges the district court's imposition of conditions upon his release. He contends that the district court's conditions, requiring him to file proper tax returns and pay back taxes, are improper for a number of reasons. That issue, however, is not properly before this Court. The record shows that the district court

order imposing the release conditions is no longer in force and that petitioner's challenges are now moot. It is true that the district court initially authorized conditional release (Pet. App. A1-A2) and the court of appeals partially affirmed the conditions imposed by the district court (*id.* at A10-A11). But petitioner failed to comply with those conditions within the district court's prescribed time limit and failed to obtain a stay of the district court's order. The court then entered a new order requiring petitioner, unconditionally, to remain in custody (*ibid.*). In short, the district court's order imposing the conditions that petitioner finds objectionable has now expired. The release conditions no longer exist. Accordingly, there is no basis for further review of those conditions.

2. The only question presented by the detention issue in its current posture is whether the district court properly ordered petitioner unconditionally detained. Under the Bail Reform Act of 1984, the district court's finding that petitioner's appeal does not raise a substantial issue (Pet. App. A10) provides a sufficient ground for his continued detention. See 18 U.S.C. (Supp. II) 3143(b)(2). Petitioner has not sought review of that determination from the court of appeals.[4] Thus, any challenge to petitioner's unconditional detention, ordered by the district court on July 10, 1986, is not properly before this Court.

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[4] The district court stated in its original order that it could see nothing meritorious in petitioner's appeal, but it nevertheless assumed in its findings, based solely on the professed beliefs of defense counsel, that the appeal raises "substantial questions of law" (Pet. App. A1). Petitioner contends that "[t]he circuit court upheld the district court's equivocal finding of a substantial issue based upon unspecified arguments of counsel" (Pet. 14). That contention is clearly incorrect. The government challenged the court's apparent finding that petitioner's appeal raises substantial issues. The court of appeals' opinion did not address the issue; instead, it referred the government's challenge to "the panel that will hear the case on the merits" (Pet. App. A5). That panel failed to rule on the issue while the conditional release order remained in force.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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